IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.2973 OF 2003

Laxman Sakharam Mathane ...Applicant.

V/s

Mrs. Usha Laxman Mathane ...Respondent.

Mr. Uday Warunjikar for the applicant.

Mr. S.S. Tatkare, APP for the State.

CORAM: V.M. KANADE, J.

DATE: 12th January, 2006

ORAL ORDER:

1. Heard the learned Counsel for the applicant and the learned APP for the State.

2. The applicant in the present case is challenging the judgment and order passed by the Second Joint Judicial Magistrate, First Class, Karad in Criminal Misc. Application No. 242 of 1999 and also the order passed by the 5th Judicial Magistrate, Karad in Misc. Application No. 263 of 2000 whereby the application filed by the applicant for restoration was rejected.

3. Brief facts which are necessary for the purpose of deciding the present application are as under:-

4. The applicant and the respondent got married on 7/6/1985 according to Hindu Vedic Rites. Thereafter, it is alleged by the wife in her application for maintenance which was filed under section 125 of the Criminal Procedure Code that within six months after the marriage, the husband sent the wife to her parents and, thereafter, did not maintain her. It is further stated in her application that the applicant got married to another girl illegally. She, therefore, filed an application for maintenance under section 125 on 7/8/1999. The reply was filed by the husband - the present applicant to the said application and the application for maintenance was opposed. It was stated in the reply that the applicant was ready to maintain the respondent - wife and, therefore, prayed that the application may be dismissed. This reply was filed on 10/5/2000. The examination-in-chief of the applicant was recorded on 10/4/2000 and, at that time, the Written Statement had not been filed by the husband, the applicant herein. On the same day, an application was filed on behalf of the husband to cross-examine the wife. That application was allowed. However, further from 10/4/2000 till 30/6/2000 the respondent - wife was not cross-examined either by the husband or by his advocate. The Trial Court, therefore, after recording these facts, came to the

conclusion that the husband was purposely trying to prolong the case unnecessarily. Further the Trial Court observed that 7 X 12 extract which was filed by respondent - wife indicated that the applicant herein was in possession of the agricultural land and, therefore, accepted the documentary evidence filed by the applicant. Though the respondent - wife prayed for maintenance @ Rs 1500/-, that claim was not granted. However, the respondent - wife was awarded maintenance @ Rs 800/- per month and the husband was directed to pay the amount of maintenance from the date of application i.e. from 7/8/1999. After the said order was passed, the husband filed an application under section 126(2), stating therein that on the said date, the lawyers had boycotted the Courts and, therefore, his lawyer could not remain present. Thereafter, he had engaged another advocate to find out as to what happened in his case. However, since the information was not received within time, the application filed by the wife had been adjourned. It is further averred in the said application that, in the meantime, the learned Magistrate was transferred and his Board was transferred to the Second Joint Court. It was further averred that, therefore, he was under the bonafide impression that his case was before the same Court. He has further averred that from

20/6/2000 till 1/7/2000, he was suffering from Malaria and, therefore, during this period, he could not know about the progress of the case and the concerned lawyer who was entrusted with the work also could not attend the court proceedings due to strike and boycott which was declared by the Association. He has further stated that, thereafter, when he received notice dated 19/8/2000 for the payment of alimony, he came to know that the order has been passed. This application was heard by the 5th J.M.F.C.. The Trial Court, while considering the application which is filed under section 126(2), has observed that the husband had examined one Dr. Sanjay Kumar Yadav as witness and had also examined himself on oath before the Court. The Trial Court in view of provisions of section 126(2) came to the conclusion that the husband had deliberately avoided appearing in Court and, therefore, the provisions of section 126(2) are not strictly applicable in the present case. Further, it was held that sufficient cause has not been made out for setting aside the ex-parte decree.

5. After the application was filed in this court, notice before admission was issued on 8/8/2003 and it was made returnable on 14/8/2003 and an ad-interim relief was granted in terms of prayer clause (a) and

(b). It appears from the record that the respondent was not served for a long time and the matter, as a result of notice not being served on the respondent - wife, was not placed on the admission board. Thereafter, on 11/8/2005 the order was passed by A.S. Oka, J. observing that the application could not be decided finally as the notice issued by this Court was not served for final disposal and, therefore, fresh notice was issued to respondent. During this period the order passed by the Trial Court could not be executed as it was stayed.

6. The learned Counsel appearing on behalf of the applicant vehemently argued that the cause shown by the applicant was sufficient for setting aside the ex-parte order which was passed by the Trial Court. He submitted that the Trial Court had not taken into consideration the fact that the applicant - husband had shown his willingness to maintain the wife and, therefore, the question of grant of maintenance was uncalled for. He submitted that the husband was suffering from malaria and that due to strike his advocate could not attend the court case. He submitted that the trial court had erred in rejecting the application of the husband under section 126(2). He submitted that the ex-parte order, therefore, was

liable to be set aside.

7. Though the Counsel for the applicant was asked whether the applicant - husband was ready to deposit any amount towards the interim maintenance, the learned Counsel submitted that he has no such instructions and insisted on proceeding with the hearing of the case.

8. In my view, there is no reason to interfere with the order passed by the Trial Court. From the impugned order, it is apparent that the applicant - husband had deliberately avoided appearing in the Court. There is no evidence on record to indicate that during the time of strike, the applicant was not well. The applicant has not produced sufficient evidence to prove his inability to attend the proceedings. It is obvious that every attempt was made to prolong the proceedings and, in fact, the applicant has succeeded in his design as he has continued to enjoy the stay which was granted by this Court for a period of three years on account of the notice which was issued by this Court not being served upon the respondent - wife. The respondent - wife in her application has stated that her husband re-married and, therefore, it was not possible for her to stay

with the husband in his matrimonial house. Further, from the record, it can be seen that, initially, the Written Statement was filed by the husband. The Court had to record the examination-in-chief of the wife. Thereafter, the application was made to cross-examine the wife - respondent herein. However, till the date of ex-parte order neither the husband nor his advocate cross-examined the respondent - wife. This clearly shows the approach and the attitude of the applicant in prolonging the case.

9. The perusal of section 126(2) of the Criminal Procedure Code clearly shows that if the Court comes to the conclusion that deliberate attempt is made to prolong the court proceedings then in such an eventuality the Magistrate has power to proceed to hear and determine the case ex-parte and such an order is not to be set aside lightly unless sufficient cause has been shown. Section 126(2) has been incorporated in order to empower the Magistrate to proceed to decide the application filed by the wife under section 125, if he finds that the husband is deliberately trying to protract the proceedings. Section 125 of the Criminal Procedure Code gives right to the wife to claim the maintenance if she is in a position to show that her husband is not maintaining her. The said

provision is meant to ensure that the wife gets maintenance to sustain herself. It is a right conferred on the wife over and above her right to claim permanent alimony under section 24 and 25 of the Hindu Marriage Act. The Legislature, therefore, thought it fit to give power to the Magistrate to proceed ex-parte in such cases as the Legislature found that there is a tendency on the part of the husband not to give maintenance to the wife. Section 126 sub-clause (2) and the proviso thereto provides that only if the sufficient cause is shown by the husband the ex-parte application can be restored. Thus discretion is vested with the Magistrate to reject the application for restoration, if sufficient cause is not shown by the husband as it has to be borne in mind that this provision has been made specifically in order to dissuade the husband from trying to prolong and protract the proceedings with a view to avoid the payment of minimum maintenance to the wife. The word "good cause", therefore, which is used under section 126(2) is some thing more than what is contemplated in the provisions of the Limitation Act and the provisions of Order 9 Rule 13 or similar provisions in the Civil Procedure Code. In the present case, facts themselves are self eloquent and, therefore, in my view, there is no reason to interfere

with the order which is passed by the lower court. The lower Court has given cogent reasons while dismissing the application which was filed by the husband. Since the Criminal Application has not been admitted, in my view, this is not a fit case where rule should be granted on the Criminal Application and the Criminal Application is, therefore, liable to be dismissed in limine for the reasons which are recorded hereinabove. In the result the following order is passed:-

O R D E R

. Criminal Application is dismissed.

. The Trial Court is directed to institute the execution proceedings as expeditiously as possible on an application being presented by the wife of the applicant. On such application being preferred, this application to be decided within a period of eight weeks.

. Copy of this order to be sent to the the respondent for communication.

V.M. KANADE, J.